



FAIR POLITICAL PRACTICES COMMISSION

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March 28, 2005

Heather C. McLaughlin
City Attorney
The City of Benicia
City Hall
250 East L Street
Benicia, CA 94510.

**Re: Your Request for Advice
Our File No. A-05-013**

Dear Ms. McLaughlin:

This letter is in response to your request for advice on behalf of Benicia Mayor Steve Messina and Councilmember Tom Campbell regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ This advice is based on the facts you have provided in your request. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Section 83114.)

QUESTIONS

1. Does Mayor Messina have a potential conflict of interest that would prohibit him from participating in a governmental decision regarding the City's consideration of the Downtown Streetscape Plan?
2. Does Councilmember Campbell have a potential conflict of interest that would prohibit him from participating in a governmental decision regarding the City's consideration of the Downtown Streetscape Plan?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All statutory references are to the Government Code unless otherwise indicated. All regulatory references are to Title 2 of the Code of Regulation unless otherwise indicated.

CONCLUSIONS

1. & 2. Yes. Both Mayor Messina and Councilmember Campbell have a potential conflict of interest that would prohibit them from participating in a governmental decision regarding the City's consideration of the Downtown Streetscape Plan.

FACTS

The Benicia City Council is considering the implementation of downtown parking improvements to First Street, the city's "Main Street." This includes a reallocation of previously appropriated funds for final design review, allocation of more funds from the General Fund reserves to fund preparation of a mitigated negative declaration in accordance with California Environmental Quality Act (CEQA) requirements, and submittal of a grant application for funding from the Transportation Enhancements Program and from any other applicable grant programs.

Mayor Steve Messina and his wife own a downtown ice cream and sandwich shop located on leased property on First Street and residential rental property just off of First Street on F Street. The Mayor also has an interest in a vacant lot on First Street currently going through the approval process for a mixed use (residential and commercial) project, and City Councilmember Tom Campbell owns real property and a business just off of First Street. The properties are all located within 500 feet from the property that is the subject of the governmental decision.

Both Mayor Messina and Councilmember Campbell have recused themselves and left the council chambers during the previous council meetings involving discussions of this item. Staff is now proposing to agendize the item for an upcoming city council meeting where the council will be asked to decide and or authorize the following proposed projects:

- Reallocation of \$37,000 previously appropriated by the City Council (Resolution No. 04-120) for restriping and signing costs to now pay for the preparation of the final design and cost estimate on the Downtown Streetscape Plan which includes angled parking improvements, corner bulb-outs, enhanced crosswalks, street restriping, signage, and other streetscape improvements;
- Allocation of another \$30,000 from the General Fund Reserves for the preparation of a mitigated negative declaration in accordance with CEQA requirements;
- Submittal of a grant application for funding from the Transportation Enhancements (TE) Program and from any other applicable grant programs for the design and construction of all or a portion of the downtown parking improvements including angled parking, corner "bulb-outs," crosswalk

enhancements, parking and street restriping, signage, and other related improvements in accordance with the Downtown Streetscape Plan.

- Consideration of a status report on the final design, environmental evaluation, and grant application.
- Direction on the installation of all or a portion of the proposed First Street Improvements.

The improvements to the street parking on First Street will improve the parking to the entire downtown area. Other businesses in the downtown area will be impacted by the improvements. There are 1,119 parcels in the downtown area.

ANALYSIS POTENTIAL CONFLICT OF INTEREST

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule is that a conflict of interest exists whenever a public official makes a governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

STEPS 1 & 2: ARE MAYOR MESSINA AND COUNCILMEMBER CAMPBELL PUBLIC OFFICIALS MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

As members of the Benicia City Council, Mayor Messina and Councilmember Campbell are public officials under the Act. (Section 82048.) Mayor Messina and Councilmember Campbell will be called upon to make governmental decisions considering whether the City should allocate funding for and adopt the proposed project for the Downtown Streetscape Plan.

STEP 3: DO MAYOR MESSINA AND COUNCILMEMBER CAMPBELL HAVE POTENTIALLY DISQUALIFYING ECONOMIC INTERESTS?

A public official has a financial interest in a decision within the meaning of section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a

member of his or her immediate family, or on any one of five enumerated economic interests, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (§ 87103(a); reg. 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (§ 87103(d); reg. 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (§ 87103(b); reg. 18703.2);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (§ 87103(c); reg. 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (§ 87103(e); reg. 18703.4);
- An economic interest in his or her personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule (§ 87103; reg. 18703.5).

Under the facts you have presented, assuming Mayor Messina and Councilmember Campbell each have a direct or indirect investment worth \$2,000 or more, or is a director, officer, partner, trustee, employee, or holds any position of management in their respective businesses, they each have an economic interest in their respective business entity. If either Mayor Messina or Councilmember Campbell receive income from their respective businesses aggregating \$500 or more within 12 months prior to the time the governmental decision is made, he will also have an economic interest in the business as a source of income to him. Additionally, both Mayor Messina and Councilmember Campbell each have an economic interest in any customers from whom they have received income aggregating \$500 or more within 12 months prior to the time the governmental decision is made.²

Finally, since both Mayor Messina and Councilmember Campbell own real property, they each have an economic interest in the real property they own.³ Your account of the facts does not suggest that the decisions in question will have a personal financial effect on Mayor Messina or Councilmember Campbell, apart from effects on

² Your facts do not implicate customers, therefore, we do not further analyze this economic interest.

³ We assume that each has a direct or indirect interest worth two-thousand dollars or more in fair market value. Additionally, Mayor Messina has an economic interest in the leased property on which his ice cream and sandwich shop is located. (See *McLaughlin* Advice Letter, No. A-04-235). For purposes of our analysis in addressing this specific conflict of interest question, both of his properties are analyzed together, since they are both located within 500 feet of the property that is the subject of the governmental decision

their other economic interest. We will therefore not, separately consider personal financial effects in the remaining analysis.

STEP 4: ARE MAYOR MESSINA AND COUNCILMEMBER CAMPBELL'S ECONOMIC INTERESTS DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?

“In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly or indirectly involved in the governmental decision.” (Regulation 18704(a).)

Real Property: For governmental decisions which affect real property interests, the standards set forth in regulation 18704.2 apply (regulation 18704(a)(2)).

Regulation 18704.2(a) states:

“(a) Real property in which a public official has an economic interest is directly involved in a governmental decision if any of the following apply:

- (1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision....”

Since each of Mayor Messina's real properties and Councilmember Campbell's real property are located within 500 feet of the boundaries of the property that is the subject of the governmental decision, each of the properties are directly involved in the governmental decision.

Business Entities and Source of Income: For governmental decisions that affect business entities and sources of income, the standards set forth in regulation 18704.1(a) apply.

Regulation 18704.1(a) states:

“(a) A person, including business entities, sources of income ... is directly involved in a decision before an official's agency when that person, either directly or by agent:

- (1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;
- (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the

issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Since it does not appear that either Mayor Messina’s or Councilmember Campbell’s business entity meets the provisions of regulation 18704.1(a), neither business entity would be indirectly involved.

STEP 5: MATERIALITY STANDARD

Real Property: Once the degree of involvement is determined, Step 5 of the conflict of interest analysis addresses the applicable materiality standard. Regulation 18705.2 sets forth the materiality standards for real property economic interests.

Directly Involved Real Property: The financial effect of a governmental decision on real property that is directly involved in the decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (Regulation 18705.2(a)(1).)

Source of Income/Business Entity: Regulation 18705.1(c) sets forth the materiality standards for an economic interest in an indirectly involved business entity. Under regulation 18705.1(c)(4), the financial effect of a governmental decision on a relatively small business in which a public official has an interest and that is indirectly involved in the governmental decision is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”

STEP 6: REASONABLY FORESEEABLE

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made depends on the facts surrounding the decision. A financial effect need

not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

You have indicated that because of the nature of both councilmembers' interests, "it seems foreseeable that the improvement of the street parking could have a material effect on their interests." Assuming this to be the case, each official has a conflict of interest in the decisions you describe.

STEP 7: PUBLIC GENERALLY

Even if a public official determines that his or her economic interest will experience a material financial effect as a result of the governmental decision before the official, he or she may still participate under the "public generally" exception if the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally. (Section 87103, regulation 18707.) Regulation 18707.1, subdivision (a) establishes a two-pronged test to determine if the material financial effect of a governmental decision on a public official's economic interest is indistinguishable from its effect on the public generally. Under this test, the governmental decision must affect a "significant segment" of the public generally *and* the financial affect from the governmental decision on the public official's economic interest must be "substantially the same" as its affect on the significant segment identified. (Regulation 18707.1 (b)(1) and (b)(2).)

Significant Segment:

A. Real Property: For real property interests, the criteria for meeting the first prong of the public generally test is provided in regulation 18707.1(b)(1)(B). Under that provision, the decision must also affect:

"(i) Ten percent or more of all property owners or all homeowners in the jurisdiction of the official's agency or the district the official represents; or

(ii) 5,000 property owners or homeowners in the jurisdiction of the official's agency."

You have not presented any facts indicating that the governmental decision would affect either (1) ten percent or more of all property owners or all homeowners or (2) 5,000 property owners or homeowners. You have indicated that there are 1,119 parcels in the downtown area.⁴ In order for the public generally exception to apply, the decision

⁴ The Commission has advised that in determining the applicable "significant segment," regulation 18707.1(b)(1)(B) "does not permit an alternate rule based on the number of parcels affected by the decision. ... The number of parcels affected is not determinative as to the number of property owners affected by a decision since one property owner can own [numerous] parcels ... Therefore, the parcels cannot be counted in lieu of property owners." (*Doi Advice Letter*, No. I-04-076.)

must affect the indicated number of "property owners" or "homeowners" in the jurisdiction or the district the official represents.

This requirement is much broader than an effect simply on businesses located within the downtown area. Therefore, it is unlikely that the first prong of the two-pronged test for the public generally exception will be met.

Substantially the Same Manner:

The second prong of the test for the "public generally" exception to apply requires that "the governmental decision will financially affect a public official's economic interest in substantially the same manner as it will affect the significant segment identified [above]." (Regulation 18707.1(b)(2).)

If the significant segment identified above is not affected by the governmental decision, the analysis ends, because the first prong of the two-part test is not met. Accordingly, the second prong of the two-part test, "substantially the same manner," need not be analyzed (regulation 18707(b)(3)).

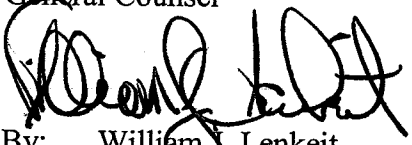
STEP 8: LEGALLY REQUIRED PARTICIPATION

You have stated that step eight — regarding the exception for "legally required participation," do not apply here.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel


By: William J. Lenkeit
Counsel, Legal Division

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